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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 364

UNITED MINE WORKERS OF AMERICA, DISTRICT 31, AND LOCALS NOS. 4050, 4346, 1379, 2338, 4047 AND 8327, ***Petitioners,***

vs.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 364

UNITED MINE WORKERS OF AMERICA, DISTRICT 31, AND LOCALS NOS. 4050, 4346, 1379, 2338, 4047 AND 8327, *Petitioners,*

vs.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, United Mine Workers of America, District 31, and Locals Nos. 4050, 4346, 1379, 2338, 4047 and 8327,[1-2]

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[1] Petitioners, United Mine Workers of America, District 31, and Locals Nos. 4050, 4346, 1379, 2338, 4047 and 8327, will be referred to herein as "Petitioners".

[2] Petitioners herein were the respondents in the case in the United States Court of Appeals for the Fourth Circuit, Numbered 6409, and entitled "National Labor Relations Board v. United Mine Workers of America, District 31, and Locals Nos. 4050, 4346, 1379, 2338, 4047 and 8327, Respondents."

and each of them, pray that a writ of certiorari issue to review the judgment and decree of the United States Court of Appeals for the Fourth Circuit, entered on the 18th day of July, 1952, (R. A. 85[a]), by which it ordered, adjudged and decreed, on petition filed (R. A. 77) in said Court of Appeals by National Labor Relations Board (herein called "Board"), that an order of the Board entered by it on July 25, 1951, in a proceeding before said Board numbered 6-CB-87 and 6-CB-105, entitled "In the Matter of United Mine Workers of America, District 31; United Mine Workers of America, Local No. 4050; United Mine Workers of America, Local No. 4060; United Mine Workers of America, Local No. 4346; United Mine Workers of America, Local No. 1379; United Mine Workers of America, Local No. 6593; United Mine Workers of America, Local No. 2338; United Mine Workers of America, Local No. 4047; and United Mine Workers of America, Local No. 4740, and L. E. Cleghorn; United Mine Workers of America, District 31, and United Mine Workers of America, Local No. 8327, and B. H. Swaney, Inc." be enforced, and that said "United Mine Workers of America, District 31, and Locals Nos. 4050, 4346, 1379, 2338, 4047 and 8327 abide by and perform the directions of the Board in said Order contained." (R.A. 85.)

A transcript of the record in said proceeding, including the proceedings in the Fourth Circuit Court of Appeals, is

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[a] Herein "B.A." refers to the Appendix filed by National Labor Relations Board in the Court of Appeals and is styled "Appendix to Petitioner's Brief"; and "R.A." refers to the Appendix filed by Petitioners (Respondents in the Court of Appeals) and is styled "Appendix to Respondents' Brief". The number following the abbreviation refers to the page number of the respective appendices in the Fourth Circuit Court of Appeals and are now contained in the Respondents' Appendix as an addition thereto.

furnished herewith, in accordance with the Rules of this Court.[4]

Opinion Below

The opinion of the Court of Appeals (R. A. 83) is reported in — F. 2d —. The Intermediate Report of the Trial Examiner (B. A. 12) and the Board's Decision and Order (B. A. 2) are reported at 95 NLRB 550-553.

Jurisdiction

The Circuit Court of Appeals entered its judgment and decree on July 18, 1952, (R. A. 83). The jurisdiction of this Court is invoked under Title 28, U.S.C., Secs. 1254(1) and 2101(c) [Act of June 25, 1948, chap. 646, 62 Stat. 928, 961, 962, amended May 24, 1949, chap. 139, Sec. 106, 63 Stat. 104], and Section 10(e) of the Labor-Management Relations Act, 1947 (Act of June 23, 1947, Chap. 120, Title I, Sec. 101, 61 Stat. 147, amended June 25, 1948, chap. 648, Sec. 32, 62 Stat. 991).

Summary and Statement of the Matter Involved

On October 13, 1950, the National Labor Relations Board (Petitioners below and hereinafter called "Board") issued its consolidated complaint against United Mine Workers of America, District 31, and Locals Nos. 4050, 4060, 4346, 1379, 6593, 2338, 4047 and 4740 of the United Mine Workers of America in the "Cleghorn" case, and against United Mine Workers of America, District 31, and Local No. 8327, of the United Mine Workers of America, in the "Swaney" case, charging them with the commission of unfair labor practices within the meaning of Section 7, and in violation of Section

[4] A stipulation has been filed regarding the printed record for the purposes of the petition for writ of certiorari, and the proceedings in the Fourth Circuit Court of Appeals are now contained in the Respondents' Appendix as an addition thereto.

8, sub-sections (b)(1)(A), of the Labor-Management Relations Act, 1947,[5] (B. A. 551).

Petitioners herein filed (1) a Motion to Dismiss the Complaint (B. A. 574), (2) their Answer to the Complaint (B. A. 585) and (3) also filed their Joint and Several Motions for a Severance of Causes and for a more Definite Statement or Bill of Particulars of vague and uncertain averments (R. A. 1), hereinafter discussed.

The Motion for Severance of Causes was denied by the Trial Examiner (B.A. 582) (B.A. 66). The Motion for Bill of Particulars was granted in part prior to the Hearing. The issues as to the sufficiency of the Complaint, the granting of the Bill of Particulars furnished and the Consolidation Order, were appealed by the Petitioners (Respondents below), directly to the Board. The appeal to the Board was denied by the Board's Order of November 7, 1950 (R.A. 75).

A Hearing was had before Allen MacCullen, a Trial Examiner of the Board, who, under date of March 5th, 1951, issued his Intermediate Report and Recommended Order (B.A. 12-44).

The Trial Examiner in his findings of fact and conclusions of law (B.A. 13), exonerated Locals Nos. 4060, 6593 and 4740 of charges of unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act, and dismissed the Complaint as to them, but held that the Petitioners, District 31, and Locals Nos. 4050, 4346, 1379, 2338, 4047 and 8327, had restrained and coerced the employees of Cleghorn and Swaney in the exercise of the rights guaranteed by Section 7 of the Act.

The Petitioners herein, Respondents below, filed their Exceptions to this Intermediate Report of the Trial Exam-

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[5] The term "Act" as used herein refers to Labor-Management Relations Act, 1947.

iner (B.A. 47-57) (R.A. 17-27), and filed their brief in support of their Exceptions before the Board. On July 25, 1951, the Board handed down its decision and order, affirming the Intermediate Report of the Trial Examiner in all respects, including the dismissal of the Complaint insofar as Local Nos. 6593, 4060 and 4740 violated section 8(b)(1)(A) of the Act, and dismissed the same insofar as it alleged that District 31, and Locals Nos. 4050, 4346, 1379, 4047 and 8327 violated Section 8(b)(1)(A) of the Act by restraining and coercing the employees of Swaney Trucking Company, Howard T. Mitchell and Paul Crites (B.A. 2).

On March 13, 1952, the Board filed with the United States Court of Appeals for the Fourth Circuit its Petition for enforcement of said Board's Order of July 25, 1951. In the Court of Appeals, petitioners contended, among other matters,[6] that (1) the Trial Examiners of the Board and the Board were limited in their Rulings on evidence at Hearings by the "Federal Rules of Practice and Procedure", (2) that the Board's findings of fact and conclusions that petitioners had violated Section 8(b)(1)(A) of the Act were not supported by substantial evidence on the record considered as a whole, and (3) that even if the Court concluded that petitioners had committed unfair labor practices as charged in the complaint, the Board's order was too broad and exceeded the Board's power and jurisdiction granted under Section 10(c) of the Act, and the limitations imposed by the Federal judiciary upon such power and

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[6] In the Court of Appeals, in addition to the position that the Board's order is too broad and should be modified, petitioners asserted that the "Cleghorn" proceedings should not have been joined and heard jointly with the "Swaney" proceedings; that the actions and rulings of the Trial Examiner were prejudicial; and that petitioners' alleged activities are not unfair labor practices affecting commerce within the meaning of the Act, and that the Board was without power to issue its order and that the Court of Appeals had no jurisdiction to enter a decree enforcing the same.

jurisdiction to issue cease and desist orders, and therefore required modification. On July 18, 1952, the said Fourth Circuit Court of Appeals decreed that said Board order, "will be enforced" (R.A. 85) without modification or change. Petitioners now seek a writ of certiorari to review said judgment and decree of enforcement.

Statute Involved

The pertinent provisions of the Labor-Management Relations Act, 1947, are set forth in the Petitioners' (Respondents') Brief before the Fourth Circuit Court of Appeals, Pages 43 to 45 thereof.

The Facts

(a) *The Parties*

The pertinent facts in this consolidated proceedings involve two separate and distinct fact situations. One set of facts involves the operations of the L. E. Cleghorn Company; the other the operations of the Swaney Companies, which Companies include B. H. Swaney Company, B. H. Swaney and Sons, Inc. and Swaney Trucking Company, a partnership. L. E. Cleghorn and the Swaney Companies produced bituminous coal by the strip mining method. Their strip mines were located in Harrison County, West Virginia, one of the Counties of Northern West Virginia. District 31, United Mine Workers of America and its Locals represent approximately 23,000 coal mining employees in collective bargaining in this area.

There was no connection or interrelation between the "Cleghorn" operation and the "Swaney" operations, and the time element is different, that is, September, 1949 to February, 1950 in the Cleghorn case and April and May, 1950 in the Swaney case. No members of Locals 4047, 4050,

1379, 4346 or 2338 were shown to be present at the Swaney tipple, and no former employees of Swaney were shown to have been at the Cleghorn tipple. Therefore, this very great difference between the two fact situations is recognized by the Trial Examiner in his Intermediate Report (B.A. 19), when he stated "the events pertinent to the issues in this hearing involved two separate and distinct courses of activity by District 31 and the various Locals and will be treated separately in this Report."

(b) *Geographical Location of District 31, United Mine Workers of America*

District 31, United Mine Workers of America, represents approximately 23,000 employees in collective bargaining in approximately 13½ Counties in Northern West Virginia, and it covers approximately the same geographical territory as the Northern West Virginia Coal Association (B.A. 388-389). Harrison County, in which the strip mines of the two charging Companies are located, is situated approximately in the center of this 13½ County area.

(c) *Statement of Facts in the L. E. Cleghorn Case*

L. E. Cleghorn's employees had never been under union contract with Petitioners. On September 19, 1949, about 10:00 o'clock in the morning a caravan of cars parked on the berm of a public highway adjoining the Cleghorn property. Egress from the property to the highway was not blocked (R.A. 39) (R.A. 53). Cleghorn stated someone among the pickets claimed they were United Mine Workers, but he did not know any of the pickets (B.A. 163). Witnesses estimated about 50 to 75 men were in this group (R.A. 39), and they stayed for about one hour (R.A. 36).

The police arrived at the Cleghorn operation about the same time as the pickets on this occasion (R.A. 38). There

was no violence or any threats of violence made to anyone, in fact, nothing happened (B.A. 162) (R.A. 52). Kenneth Stalnaker was not present on this occasion. Only two members of Local 4050 and one member of Local 1379 was stated to be present (B.A. 23).

On the morning of October 22, 1949, a caravan of cars (R.A. 38), parked along the side of the public highway near the Cleghorn tipple (R.A. 39). The occupants of the cars stood on the public highway near the edge of Cleghorn's property (R.A. 38). Kenneth Stalnaker was stated to be among the pickets, and while standing on the public highway had a conversation with Mr. Cleghorn (B.A. 167) (R.A. 43).

Stalnaker shook hands with Cleghorn (R.A. 41) and (R.A. 51) asked Cleghorn to shut down until the strike was over (B.A. 193), and Cleghorn agreed to do so. Lee Allawat, Ralph Migialolo, Tony Cyrianni and Patsy Cyrianni were alleged to have been identified among the pickets. The pickets only remained there approximately 10 minutes (B.A. 168). There was some name calling but nothing happened (B.A. 162) (R.A. 41). Witnesses estimated about 100 men were in this group (R.A. 38) (B.A. 167 and B.A. 288). One member from Local 1379, one from Local 4346 and two from Local 4050 were said to be present on this occasion (B.A. 25).

No pickets visited the Cleghorn operation between October 22, 1949 and December 1, 1949 (R.A. 38). On the morning of December 1, 1949, a caravan of cars drove down the public highway and parked opposite the Cleghorn tipple. They did not block egress from the property (B.A. 169). Mrs. Starcher, Cleghorn's office girl, who worked in the scale house, took down some license numbers of the cars, and one of the men seeing what she was doing took the list of license numbers away from her. At that instant Cleghorn picked

up a pick which was lying nearby (R.A. 44 and R.A. 48), and then struck one of the men and as a result, a fracas ensued (R.A. 52) (R.A. 44).

When the disturbance began Mrs. Starcher was pushed into the scale house to avoid injury to her (R.A. 47), and she was not harmed or injured by anyone, nor was she imprisoned in the scale house (R.A. 47 and R.A. 48), as is alleged in the Trial Examiner's Intermediate Report (B.A. 25). In the scale house were two (2) guns (R.A. 44) (R.A. 45). Cleghorn and the tipple crew were armed (R.A. 51).

Kenneth Stalnaker is alleged to have been seen on the public highway earlier that morning a considerable distance away from the scale house, but drove off before anything happened (R.A. 43). He was not around when the fight occurred (R.A. 39 and R.A. 44). The Testimony (R.A. 44) does not sustain the Trial Examiner's statement that "Stalnaker led the pickets that day." About 100 pickets were estimated by witnesses to be present (B.A. 171). No local members were shown to be present on this occasion. No blocking of traffic occurred (R.A. 47, 53).

On January 30, 1950, approximately 12 to 15 cars parked off the public highway near a brick church, located off the highway approximately 2000 feet from Cleghorn's tipple (R. A. 39). The road leading to the tipple from the highway was not blocked (R. A. 52). About 7 or 8 pickets walked up from the brick church on the public highway to the tipple but remained on the public highway (R. A. 39), and from there talked to Cleghorn and a truck driver (R. A. 49). These men remained there about 15 minutes and then returned to the brick church. The brick church could not be seen from Cleghorn's tipple (R. A. 45). None of the men, either at the tipple or at the brick church were identified (R. A. 52). It was not shown that anything was done in the presence of Cleghorn's employees inasmuch as

there was no stoppage of work and the truck drivers on the road were independent contractors (R. A. 52).

There was a man in a station wagon on the public highway that day, and Mrs. Starcher stated that someone told her it was Joseph Cromisco, but she did not know him (B. A. 277).

On February 1, 1950, approximately 90 alleged pickets drove their cars and parked them near the brick church, located 2000 feet from the Cleghorn tipple (R. A. 39). They walked down the public highway to the tipple, but did not enter on Cleghorn's property and remained on the public highway (B. A. 182) (R. A. 45). Meline Serdich, one of the men, asked permission to come on the Cleghorn premises so he could talk to Cleghorn (B. A. 183). Cleghorn gave him permission and Cleghorn agreed to shut down. Serdich is alleged to have identified himself as President of Local 4047, but Government's witness Otto Heyer testified that Meline Serdich was a Mine Committeeman (B. A. 78), and the Intermediate Report (B. A. 28) says that Serdich was a Mine Committeeman and the Appendix of the Board lists Joseph Serdich as President (B. A. 561). The entrances and exits to the property were not blocked (R. A. 45). There was no trouble that day while the pickets were present or after they left (B. A. 185). Besides Meline Serdich, one other member of Local 4047, two members of Local 4050 and one member of Local 1379 were said to be present on this occasion.

On February 8, 1950, Harry Glover and Kenneth Patterson, truck drivers, employed by Cleghorn, were hauling coal to a tipple on Hackers Creek Road in Upshur County, West Virginia, and were on the public highway, when two automobiles passed them and then stopped. This incident occurred in Upshur County, West Virginia, near Buckhannon, West Virginia, more than 25 miles from the Cleg-

horn tipple located in Harrison County, West Virginia (R. A. 49). Patterson did not know but one of the alleged pickets at that time, but later at the Upshur County Court House, they were given the information as to the names of some of the men. Glover had never seen or known any of the men prior to this incident (R. A. 55). This group of men was escorted to the Upshur County Court House at Buckhannon, West Virginia (B. A. 299), where their names were taken down and then released. The introduction of all the foregoing happenings on the public highway in Upshur County, West Virginia, was objected to by Petitioners and overruled and admitted as evidence by the Examiner (R. A. 50).[7]

On the morning of February 10, 1950, a caravan of cars parked at the brick church, approximately 2000 feet from Cleghorn's tipple. A small group of men left their cars and walked up the public highway to the tipple property (B. A. 300). The pickets did not go on Cleghorn's property, but stood on public highway (B. A. 219-220). After some conversation the pickets left for the brick church and then drove off in their cars (B. A. 301). Nothing happened, and neither was ingress or egress blocked.

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[7] The Trial Examiner in his Intermediate Report (B.A. 29) found as follows as to happenings on February 8, 1950 in Upshur County:

"After the pickets arrived at the county courthouse they identified themselves to the police as Meline Serdich, mine committeeman, and 47 members of Local No. 4047; Frank Barberio, recording secretary and mine committeeman, Joe Dottelis, mine committeeman, and 25 members of Local No. 4050; Joe Scotchie, treasurer, and 25 members of Local No. 1379; and Edward Czeck, financial secretary, and 7 members of Local No. 2338."

The Board's Appendix has been searched to find where such statement is substantiated. The Appendix is silent as to where this evidence came from. It was later attempted to be supplied in a Supplemental Brief of the Board filed on June 18, 1952 at the time of Argument before the Fourth Circuit Court of Appeals.

(d) *Statement of Facts in the Swaney Case*

B. H. Swaney, Inc., and B. H. Swaney & Sons, Inc., both corporations, were under union contract with United Mine Workers of America from 1945 to 1950 (B. A. 604) (R. A. 28, 29, 30) and these contracts were to have expired June 30, 1949 (R. A. 59) (B. A. 101), but these two companies continued to recognize their contracts until January, 1950 (R. A. 29, 61) (B. A. 374). B. H. Swaney, Inc. controlled the operation at Erie No. 2 Tipple (Also known as Oral Lake Tipple), while B. H. Swaney & Sons, Inc. controlled the operation of Erie No. 1 Tipple. B. H. Swaney & Sons, Inc. did most of the hauling from Erie No. 1 Tipple, and had in its employ about 25 to 30 truck drivers during December, 1949. The employees of all the Swaney Companies had been shifted around from one Company to the other as it suited the management. The employees of both B. H. Swaney, Inc., and B. H. Swaney & Sons, Inc. belonged to Local 8327 prior to January 1, 1950. The acts alleged in this case all occurred between April 7, 1950 and May 26, 1950. They do not overlap with the acts in the Cleghorn case and arise out of a different fact situation entirely (Intermediate Report B. A. 19).

On January 1, 1950, B. H. Swaney & Sons, Inc. ceased to operate any mining operations but continued as a corporate entity (R. A. 29). In July, 1950, it ceased existence entirely as a corporate entity. All the truck drivers for B. H. Swaney & Sons, Inc. were transferred on January 1, 1950, to the payroll of a newly created partnership, Swaney Trucking Company, which was to haul coal for B. H. Swaney, Inc. at the Oral Lake Tipple and Swaney Construction Company (B. A. 376-377-378). Swaney had continued to treat the union contract in operation even after it expired (B. A. 381) (R. A. 29) (B. A. 102). He had

promised his men he would sign the new contract when the same was put in operation by the big producers (B. A. 604).

On April 3, 1950, at Erie Tipple No. 1 a meeting was held with Paul Keener, who stated he represented the truck drivers of Swaney Trucking Company. Present were Braden Swaney, Jr., P. S. Hill and Robert Huchinson, representing Swaney Trucking Company (B. A. 384-385). P. S. Hill told Keener that since he did not represent a majority of the truck drivers he could not negotiate with them (B. A. 364-365) and (B. A. 386-387). Hill also stated: "No I cannot talk to you; you are not a member of the Union" (B. A. 497-498).

On the morning of April 7, 1950, the truck drivers of Swaney Trucking Company reported for work at the Oral Lake Tipple, but refused to work until the Swaney Company signed a union contract (B. A. 494). Robert Huchinson, tipple foreman for Erie No. 1 and Oral Lake Tipple, was told by Hill that if the truck drivers refused to work to tell them to get off the property (R. A. 68) (B. A. 469). Huchinson went to the shop to persuade the men to work, but the truck drivers stated they would not work until they obtained a union contract (B. A. 493, 494). There was no spokesman and every one tried to talk for the group (B. A. 495). After Huchinson had ordered the men off the property, the truckers left. Some of the men went down to the bridge on the highway, near the entrance to the Swaney property, about 300 yards from the tipple and set up a picket line (R. A. 68) (B. A. 496). These truck drivers stopped and talked with some of the hired truck drivers coming from Bushy Fork Strip Mine (B. A. 497).

Sometime after a log was placed across the road at the bridge to induce the trucks to stop so the strikers could talk to the drivers (R. A. 31, 65) but it was removed to let the trucks pass and all trucks continued to haul coal that day

(R. A. 63-64) (B. A. 432, 433, 437, 439). One truck driver joined the strikers (R. A. 32). B. H. Swaney drove around the log (R. A. 33).

The State police came to the bridge (R. A. 33) where the pickets were standing around and the log was taken off the road (R. A. 32-33). All the tipple employees of B. H. Swaney Company at the Oral Lake Tipple were at least 1000 feet away from the bridge (B. A. 111), and not within "earshot" as alleged in the Board's Brief Page 9. The trucks hauling coal were operated by independent contractors, and it was not proved that what happened was actually heard or observed by any employees at the tipple (B. A. 111) (R. A. 63) (B. A. 33) (R. A. 65).

On April 10, 1950, two trucks of the Independent Contractors (R. A. 34) (Mitchell and Crites), were stopped temporarily by the log placed across the road, but it was immediately removed and all trucks were permitted to pass to the tipple (B. A. 542) (R. A. 31, 64). On April 11th, there was no one at the bridge and the road to the tipple was not blocked (R. A. 64).

On May 23, 1950, Howard Mitchell, one of the independent contractors hauling coal for Swaney, was stopped on the highway near the bridge by a group of cars coming in the opposite direction (B. A. 429). This alleged occurrence was against an independent contractor near the bridge and was not done within the "earshot" of any of the Swaney employees, who were at least 1000 feet away (R. A. 65, 68) (B. A. 111).

On the morning of May 26, 1950, Oakle Delaney, a coal weigher for Swaney, was sitting in his chair at the scale house weighing coal when a group of men came on the property (B. A. 466-467). Delaney was not sitting in a "wheel chair" as alleged in the Board's Brief on Page 10 thereof. The chair was built up to the scales (B. A. 467) to weigh

the coal. Delaney recognized only one man in this whole group of 35 or 40 who had formerly worked for Swaney, and that was Homer Barker, a mechanic (B. A. 468). No evidence was presented to show that any of the men alleged to be identified committed any violence that day. No representative of District 31 was present.

About the middle or latter part of June, 1950, Tom Craig, an officer of the Meadowbrook Coal Company invited B. H. Swaney, Sr., P. S. Hill and C. J. Urbaniak to the Gore Hotel at Clarksburg, West Virginia, to discuss their mutual problems. Since the Meadowbrook Coal Company, a union operation, had leased some of its coal to Swaney, it wanted the coal removed under union contract (B. A. 404). As a result of this meeting, the Lanham Tipple or Erie No. 1 Tipple was put under union contract. An agreement was then reached between Lanham Coal Company and Swaney, whereby the Lanham Coal Company would supply Swaney's operation at the Lanham Coal Company Tipple with employees (B. A. 405). The Lanham Coal Company employed only union men and it had formerly operated at Erie No. 1 tipple as a union operation under B. H. Swaney & Sons, Inc. Local Union No. 8327 which had become defunct (B. A. 365), was reactivated at the Lanham Coal Company Erie No. 1 Tipple, in the latter part of June, 1950, with an entirely different personnel and membership, and this situation existed at the time of the hearing in December, 1950.

(e) *The Order of the National Labor Relations Board of July 25, 1951*

On the basis of the foregoing facts and the Intermediate Report of its Trial Examiner (B. A. 12), the Board handed down its decision and order of July 25, 1951, affirming the Intermediate Report of the Trial Examiner in all respects, including the dismissal of the Complaint insofar as Peti-

tioner Locals Nos. 6593, 4060, and 4740 violated Section 8(b)(1)(A) of the Act, and dismissed the same insofar as it alleged that District 31, and Locals Nos. 4050, 4346, 1379, 2338, 4047 and 8327 violated Section 8(b) (1) (A) of the Act by restraining and coercing the employees of Swaney Trucking Company, Howard T. Mitchell and Paul Crites (B. A. 2).

The Order of the Board, in parts 1 (a) and (b) thereof, (B. A. 7-8) ordered District 31 and Local Unions 4050, 4346, 1379, 2338, 4047 and 8327 to cease and desist from certain unfair labor practices as to the employees of Cleghorn and Swaney, and extended this cease and desist Order to apply to all employees engaged in the mining industry within the geographical limits of District 31. In addition thereto under the affirmative action part of the Board's Order (2 (a) (b) (c), (B. A. 8-9)), it not only ordered the posting of Appendix "A" of the Order, at the business offices of District 31 and all the named Locals, but also ordered that District 31 forward to each and every Local of District 31, United Mine Workers of America, a copy of said Appendix "A" to be posted at each Local of District 31, for a period of 60 days and that said notice should be communicated to the membership of each Local in the District. This, included Locals 6593, 4060 and 4740 which had been previously dismissed from the proceedings. The complete text of the Board's Order is hereinafter set out.

The Board's Order of July 25, 1951 (B. A. 2-9)

"Upon the entire record in the case and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents United Mine Workers of America, District 31, and Locals Nos. 4050, 4346, 1379, 2338,

4047, and 8327, their officers, representatives, agents, successors, and assigns shall:

"1. Cease and desist from:

"(a) Restraining and coercing the employees, or any of them, of L. E. Cleghorn and S. H. Swaney, Inc., *or any other employees engaged in mining operations within the geographical limits of the jurisdiction of District 31, United Mine Workers of America,* in the exercise of the rights guaranteed them by Section 7 of the Act, by exerting force, or committing acts of force and violence against said employees, or any of them, or by using or threatening to use force or violence, or by taking or threatening to take punitive action or economic reprisals against any of said employees, unless said employees join in the concerted activities or become members of said District 31 and/or the said Locals, or any of them. (Italics supplied.)

"(b) In any manner restraining and coercing *said employees or any of them,* in the exercise of their right to refrain from any or all of the concerted activities guaranteed them by Section 7 of the Act. (Italics supplied.)

"2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

"(a) Post in conspicuous places in the business offices of District 31, United Mine Workers of America, and in the business offices of Locals Nos. 4050, 4346, 1379, 2338, 4047, and 8327 where notices and communications to members are customarily posted, copies of the notice attached hereto as Appendix A. Copies of the notice to be furnished by the Regional Director for the Sixth Region shall, after being signed by official representatives of District 31, United Mine Workers of America, and United Mine Workers of America, Locals Nos. 4050, 4346, 1379, 4047, and 8327, respectively, be posted by said Unions, as aforesaid, and maintained by them for a period of sixty (60) days thereafter. Reasonable

steps shall be taken by Respondents, and each of them, to insure that said notices are not altered, defaced, or covered by any other material.

"(b) Sign, as aforesaid, and mail sufficient copies of the notice, attached hereto as Appendix A, to the Regional Director for the Sixth Region, for posting, the employers operating said mines and tipples being willing, at each of the mines and tipples involved in this proceeding in the places thereat where notices, bulletins, or communications to the employees of said mines and tipples are customarily posted. Such copies of the notice shall be furnished Respondents by the said Regional Director.

"(c) *Sign, as aforesaid, and forward to each local of District 31, of United Mine Workers of America, a copy of the notice attached hereto as Appendix A with accompanying instructions directing and ordering the proper officers of the local to post and maintain same for a period of sixty (60) consecutive days thereafter, at the office, headquarters, or meeting place or places of said local, in the place thereat where notices, bulletins, and communications to members of the local are customarily posted, or, if the local does not have an office, headquarters, or regular place of meeting, or place where communications to the members are customarily posted, that said notice be communicated to the membership of the local in the manner, and by the means, in which notices, bulletins, or communications are customarily transmitted to their membership.* Copies of the notice for such purpose shall be furnished Respondents by the said Regional Director. (Italics supplied.)

"(d) Notify the Regional Director for the Sixth Region in writing within ten (10) days from the date of this order, what steps the Respondents have taken to comply herewith.

"It is further ordered that the complaint be, and it hereby is, dismissed insofar as it alleges that Respondent Locals

6593, 4060, and 4740 violated Section 8 (b) (1) (A) of the Act, and that Respondents District 31 and Locals 4050, 4346, 1379, 2338, 4047, and 8327 violated Section 8 (b) (1) (A) by restraining and coercing the employees of Swaney Trucking Company, Howard T. Mitchell, and Paul Crites.

"Signed at Washington, D. C., July 25, 1951.

JOHN M. HOUSTON, *Member,*
JAMES J. REYNOLDS, JR., *Member,*
PAUL L. STYLES, *Member,*
(SEAL.) *National Labor Relations Board."*

The Questions Presented

1. Whether the Trial Examiner and the Board committed prejudicial error when they followed the Federal Rules of Civil Procedure only at their "discretion" (Sec. 10(b) Act (B. A. 5))?

2. Whether substantial evidence on the record considered as a whole, supports the Board's findings that Petitioners in violation of Section 8(b)(1)(A) of the National Labor Relations Act, as amended, restrained and coerced the employees of Cleghorn and Swaney in the exercise of rights guaranteed by Section 7 of the Act?

3. Whether the same legal principles and legal tests as to broad cease and desist orders are to be applied to the 8(b) Sections of the Labor-Management Relations Act of 1947, as have been applied by this Court to the 8(a) Sections of the Act?

4. Whether the Board's order, as issued in this consolidated proceedings, is appropriate, just, proper and valid, under the facts and law of these consolidated cases?

Reasons Relied On for Allowance of the Writ

1. Petitioners respectfully submit that Section 10(b) of the Act does not leave it entirely to the "discretion" of the

Trial Examiner and the Board, as to when "The Federal Rules of Civil Procedure" should be followed in Labor Board Hearings (B. A. 5).

2. Petitioners respectfully submit that the Board's findings herein against District 31, United Mine Workers of America, and Locals Nos. 4050, 4346, 1379, 2338, 4047 and 8327 are not supported by substantial evidence on the record considered as a whole.

3. Petitioners contend that the Board's order as issued, is too broad, is inappropriate, unjust, improper and invalid.

4. Petitioners respectfully submit that even if this Court finds substantial evidence on the record considered as a whole to support the finding of the Board, that the Petitioners violated Section 8(b)(1)(A) of the Act, yet this Court should modify the order of the Board, as ordered to be enforced by the Fourth Circuit Court of Appeals, by limiting its application to the employees of the original charging Companies, and to the specific acts found by the Board to be violations under the complaint, and further that the Board's order for affirmative action and the posting requirements of said order, should be modified to comply therewith (B. A. 7-9).

Wherefore, Your Petitioners District 31, United Mine Workers of America, and Locals Nos. 4050, 4346, 1379, 2338, 4047 and 8327, and each of them, pray that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court of Appeals had in the case numbered and entitled on its docket No. 6409, National Labor Relations Board, Petitioners, *vs.* United Mine Workers of America, District 31, and Locals Nos. 4050, 4346, 1379, 2338, 4047 and 8327, Respondents, to the end that this case may be reviewed and determined by this Court as provided

by the Statutes of the United States, and that the judgment of said Court of Appeals herein complained of, entered on July 18, 1952 (R. A. 85), be reversed and set aside and judgment entered for Petitioners by this Court, and that said Petitioners may have such further relief as to this Court may seem proper; and

WHEREFORE, Petitioners pray that this petition be granted.

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M. E. BOIARSKY,
Kanawha Valley Building,
Charleston, West Virginia,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 364

UNITED MINE WORKERS OF AMERICA, DISTRICT 31, AND LOCALS NOS. 4050, 4346, 1379, 2338, 4047 AND 8327, *Petitioners,*

vs.

NATIONAL LABOR RELATIONS BOARD

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A

Opinion of the Court Below

The opinion of the United States Court of Appeals for the Fourth Circuit appears at (R. A. 83) of the printed record.

B

Statement of the Case

A general statement of the case appears in the preceding Petition for writ of certiorari, which is hereby adopted and made a part of this brief.

C

Jurisdiction

The Circuit Court of Appeals entered its judgment and decree on July 18, 1952 (R. A. 85). The jurisdiction of this Court is invoked under Title 28, U. S. C., Secs. 1254(1) and 2101(c) [Act of June 25, 1948, chap. 646, 62 Stat. 928, 961, 962, amended May 24, 1949, chap. 139, Sec. 106, 63 Stat. 104], and Section 10(e) of the Labor-Management Relations Act, 1947 (Act of June 23, 1947, chap. 120, Title I, Sec. 101, 61 Stat. 147, amended June 25, 1948, chap. 648, Sec. 32, 62 Stat. 991).

D

Specification of Errors

1. The Circuit Court of Appeals erred in affirming the holding of the Board to the effect that the use and application of the Federal Rules of Civil Procedure were "discretionary" with the Board and its Trial Examiners.

2. The Circuit Court of Appeals erred in affirming the holding of the Board that Petitioners violated Section 8(b)(1)(A) of the Act, because said holding is not supported by substantial evidence on the record considered as a whole.

3. The Circuit Court of Appeals erred in decreeing the enforcement of the Board's order as issued, because the order of the Board as issued is too broad, is inappropriate, unjust, improper, invalid and contrary to former decisions of this Honorable Court.

4. The Court of Appeals erred in not applying the same legal principles as to broad cease and desist orders under the 8(b) Sections of the Act, as have been announced and enforced by this Court under the 8(a) Sections of the Act.

E

ARGUMENT

I

The Prejudicial Remarks and Rulings of the Trial Examiner and the Board are Contrary to Section 10(b) of the Act

The record is full of exceptions to the action of the Trial Examiner in refusing to allow Petitioners proper cross examination. The protective attitude of Trial Examiner toward Government's witnesses and his advice and counselling of witnesses for the Government, his attitude and rulings, and his refusal to let Petitioners develop pertinent testimony, were prejudicial to the Petitioners throughout the trial of the case. His actions were affirmed by the Board (B. A. 5). The following citations from the record are not all inclusive, but are illustrative of the situation.[8]

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[8] (1) "He is going ahead until I tell him to stop" (R.A. 51). (2) "The witness is confused, and I am straightening him out, and I am going to do it" (R.A. 40). (3) "I think it is perfectly clear to me * * * that * * * a witness cannot go back a year and remember what happened on a certain day and whether he was working on that day or not" (R.A. 40). (4) "He doesn't remember any other specific date. You wouldn't nor would I" (R.A. 40). (5) "I am trying to get the witness straightened out. It is obvious there is confusion, to some extent" (R.A. 40). (6) "They were there in a group, and were responsible under law for those acts" (R.A. 41-42). (8) "If this witness really understood what 'concerted activities' means, well and good. What is meant there, as you know, and as I know, is that they were seeking to get these employees to cease work and join with United Mine Workers in the strike in which they were engaged" (R.A. 42). (9) "I make my observation now, after observation of the witness, that the witness undoubtedly is tired. He looks it and the way he is answering the questions shows it. If counsel wants to press him too close on these questions, there is nothing to do except excuse this witness until tomorrow." (R.A. 44). (10) Petitioners were refused the privilege of asking questions as to whether or not any police were present, for the purpose of contradicting prior witness (R.A. 46). (11) Petitioners tried to get evidence in to show that the Swaney Company in bad faith transferred its employees to a non-union Company, and started its own union, the "Bushy Fork Miners Union",

The Board brushed aside the foregoing objections of the Petitioners with the following statement (B. A. 5):

> "As to the fourth ground, by requiring in Section 10(b) of the Act that U. S. District Court Rules of evidence be followed in complaint proceedings *'so far as practicable,'* Congress clearly intended *to leave 'it largely to the discretion of the Board and the examiner whether they shall apply the rules of evid nce or not.'* We therefore find no prejudice in the fact that the Trial Examiner followed Rule 43(b) of the Federal Rules of

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but Examiner refused (R.A. 60, 70, 71, 72). (12) Petitioners question refused on cross examination, so to "pierce the corporate veils" of the many Swaney Companies (R.A. 62) (R.A. 34, 35, 64). (13) Petitioners objected because the Trial Examiner would not allow question concerning Swaney Trucking Company (R.A. 64), and Bushy Fork Strip Miners Union (R.A. 70). (14) Trial Examiner allows hearsay evidence to come in as to what Tanner told witness (R.A. 65). (15) Trial Examiner refused to let Respondents cross examine on matter taken up on direct examination (R.A. 34, 66). (16) The Trial Examiner allowed witness, Charles Sedan, to testify after reading a prepared statement in hall (R.A. 70). (17) The Board ruled that the Trial Examiner did not consider evidence pertinent to Case No. 6-CB-87, (Cleghorn), as applicable to Case No. 6-CB-105 (Swaney) (B.A. 4), yet in the Trial Examiner's findings (B.A. 35) he blended the facts of the two cases in such way as to make one case out of both cases, and used such blending of facts to justify his joint findings of law and his joint Recommended Order (B.A. 41), which was adopted by the Board (B.A. 3). (18) The Board ruled that it and the Trial Examiners were not restricted under Section 10(b) to the Rules of Evidence of United States District Courts, but held that said Rules were "discretionary". (B.A. 5). (19) The Trial Examiner and the Board took judicial notice of certain alleged facts clearly outside the scope of the hearing, concerning the alleged policies of the United Mine Workers of America to which action of the Trial Examiner Petitioners excepted (R.A. 35, 36, 37). (20) The Trial Examiner refused to allow Petitioners to vouch the record under Rule 43(a) and Rule 43(c) of the Federal Rules of Civil Procedure (R.A. 43, 72) yet limited cross examination under Rule 43(b) to the matter brought out on direct examination (R.A. 54, 64, 66, 71, 72). (21) The Board ruled that the Trial Examiner acted properly in refusing a new Bill of Particulars to Petitioners (R.A. 28, 75), yet did not limit the General Counsel's proof to his own Bill of Particulars (B.A. 5) (R.A. 49, 50, 54) (B.A. 584). (22) The Trial Examiner allowed Exhibits 16-A to 16-Z and Z-1 to Z-51 to be received in evidence over objection of Petitioners (R.A. 58-59).

Civil Procedure by limiting cross examination to the subject matter of the examination in chief, although he chose not to follow Rule 43(c) by permitting the vouching of the record for excluded evidence." • • • (Italics supplied.)

The only authority of the Board for such holding was a statement by Senator Robert Taft in 93 Daily Congressional Record 6676 of June 6, 1947. It is the contention of Petitioners that a remark by Senator Taft in 1947 is not sufficient basis for such holding which goes to the very right of litigants in trials under the Act. Unless this Court makes a holding on this part of Section 10(b) of the Act, confusion and prejudice in Labor Board hearings are likely to result. The pertinent part of Section 10(b) is as follows:

PREVENTION OF UNFAIR LABOR PRACTICES.

SEC. 10(b). . . . "Provided, that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, . . . *Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States,* adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., Title 28, Secs. 723-B, 723-C." (Italics supplied.)

Nowhere in the above quoted part of the Act is the word "discretion" used. Neither does the Act give the Board authority to use its "discretion" in such matters. The word "shall" is used in this Section so that "may" cannot be construed therefrom. It certainly must have been the intent of Congress to protect litigants by the use of the same Rules of Evidence as are being used in our Federal

District Courts. These Rules of Evidence were adopted by this Honorable Court many years before 1947, and the same should be applied to the Labor Board *"so far as practicable"*, and enforced whenever possible, in any Federal proceedings, to the end that litigants may get fair and impartial trials. Petitioners therefore earnestly contend that the use of "discretion" on the part of Trial Examiners and the Board, is likely to result in the future in less fair and less impartial trials in Labor Board hearings if this holding of the Board is allowed to stand in this case.

Petitioners therefore allege that the aforesaid statements, actions, and rulings of the Trial Examiners and the Board were prejudicial to the Petitioners and prevented Petitioners from receiving the full benefit of their cross examination and deprived Petitioners of the right to a fair and impartial trial as is guaranteed by the Federal Constitution of the United States. (*Sunderland* v. *United States*, 19 Fed. (2) 202, 216.)

II

The Findings of Fact and Conclusions of Law That Petitioners Have Engaged in Unfair Labor Practices Within the Meaning of Section 8(b)(1)(A) of the Act Are Contrary to Applicable Law and Are Based upon Erroneous Findings of Fact and Conclusions of Law, Are Not Supported by Competent, Admissible and Substantial Evidence, Are Contrary to the Preponderance of the Evidence Contained in the Record, and Are Contrary to Law.

(a) *Alleged Restraint and Coercion*

The important questions raised in this part of the brief are: (1) Whether the acts shown by the evidence constitute restraint and coercion, in violation of Section 8(b)(1)(A)

of the Act; (2) Whether under the evidence adduced, the Petitioners, District 31, and Locals Nos. 4050, 4346, 1379, 2338, 4047 and 8327 are responsible for said acts.

The evidence adduced at the hearing shows that the Government failed to legally prove the essential allegations of the Complaint. In the first place although the group of men who visited the Cleghorn tipple were referred to as "pickets", there was no picketing in the ordinary sense of the word. None of the men displayed any banners, placards, etc., nor was there any patrolling before the entrance of the ingress road leading from the Lost Creek Road to the Cleghorn tipple. It appears from Government's evidence that there was only from several to 150 men assembled on several occasions at the Cleghorn tipple for the most part on the public highway. Even if these acts could be construed, as alleged in the complaint as mass-picketing, mass-picketing has never been held illegal as such. It is only where such picketing has been accompanied by violence, threats of violence or has prevented ingress and egress to the premises that it has been held illegal. Only on one occasion (December 1, 1949) did any fights occur. That arose over taking car license numbers. The mere fact of numbers, regardless of any other fact, cannot be regarded as restraint and coercion within the meaning of Section 8(b)(1)(A). There is evidence to the effect that the roads leading to and from the tipple were not blocked by parked cars driven by members of the groups (R.A. 40, 41, 45, 47, 48, 52, 53).

It is submitted that there was no evidence to show that the method of parking was for the purpose of preventing any person or any vehicle from entering on the property of Cleghorn. Most times the parking was done at a Brick Church 2000 feet away (R. A. 39) from the tipple. Mass-picketing has only been held illegal in such instances where

it has formed a physical barrier preventing ingress and egress to the facilities involved (R. A. 47, 52). (*Perry Norvell Co.*, 80 NLRB 225. *Corey Corporation*, 84 NLRB 972.)

(b) *Evidence Against Each Local*

The Trial Examiner's Report and Recommended Order which was affirmed by the Board and ordered to be enforced by the Circuit Court of Appeals attaches responsibility to Locals 4050, 4346, 1379, 2338 and 4047, because it was found that some of the members of some of these Locals were present in and about the happenings at the Cleghorn tipple. Very few of the members of these large Locals were seen at any one time. Otto Heyer testified that there were at least 925 members at Local 4047 (R. A. 28). J. W. Bartlett testified on (R. A. 28) that there were approximately 480 union members at Local 4050. L. F. Wilson (R. A. 33) testified that there were at least 215 members in Local 1379. It is reasonable to assume that Local 4346 and Local 2338 were equally as large.

If the events of February 8th, 1950, are excluded from the evidence, because clearly outside the scope of the Bill of Particulars, the record discloses that but very few of the members of the hundreds of members of the foregoing Locals were ever present at any one time at the Cleghorn tipple.*

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*A search of the entire record discloses that the following pickets were identified on the following dates:

September 19, 1949—Tony and Patsy Sirianni of Local 4050 and Lee Allawat of Local 1379; October 22, 1949—Ken Stalnaker of District 31, Lee Allawat of Local 1379, Frank Mike of Local 4346 and Tony and Patsy Sirianni of Local 4050; December 1, 1949—Ken Stalnaker of District 31 (Observed on road in car and he drove away before others left.); January 30, 1950—Joseph Cromisco of Local 1379; February 1, 1950—Meline Serdich, Louis Summers of Local 4047, Tony and Patsy Sirianni of Local 4050 and Lee Allawat

When we compare the thousands of members of the different Locals in District 31 with the actual number of pickets identified in this proceedings, and when we realize that there was most of the time 100 men or less present at the Cleghorn premises at any one time, it is clear that the entire membership or even a majority of the members of these large Locals, consisting of hundreds of members, took no part in this picketing, and the entire membership should not be held responsible for the individual actions of its individual members unless it is shown that the Locals authorized, approved or ratified such actions of its members.[10]

Only one bit of evidence is shown against Local 2338 and that is on February 8, 1950, which occurred in Upshur County, West Virginia, on a public road clearly outside the Bill of Particulars, so that no responsibility should be attached to Local 2338, in this proceeding. If the evidence of February 8, 1950, is held to be inadmissible and clearly outside the scope of the Bill of Particulars, Local 2338 should be dismissed from this order.

In addition to the objection that the evidence of February 8, 1950 is admissible, General Counsel's Exhibit Nos. 16-A through 16-Z and Z-1 through 51, were not made a part of the Board's Appendix in this case.

(c) *Petitioners' Responsibility*

It was incumbent upon the Government not only to show that unfair labor practices had been committed against

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of Local 1379; February 10, 1950—Meline Serdich and Louis Summers of Local 4047 and Tony and Patsy Sirianni of Local 4050.

The Trial Examiner stated (B.A. 27) that Meline Davich, Herbert Warnick, James Sabintino, Edward Jarvis of Local 4047, and Joseph Cromisco and William Racinec, members of Local 1379, were identified on February 1, 1950, but a dilgent search of the record fails to confirm this finding.

[10] The number of men present were estimated as follows: Sept. 19: 50 to 75; Oct. 22: 100; Dec. 1: 100; Jan. 30: 60; Feb. 1: 90; Feb. 8 in Upshur County: 106; Feb. 10: 100.

Cleghorn's employees but that Petitioners were responsible for these acts. At times no identification except hearsay was made (R.A. 52, 53) (R.A. 57, 58). The same thing is true of each of the Local Unions named in the Complaint. The Government attempted to prove that these acts were committed by employees of certain coal companies, and then inferred that they were therefore the authorized agents of the Petitioners (B.A. 38) (Board's Brief, Page 16).

Except in a few cases wherein the law implies authority, the law raises no presumption of agency. Generally speaking, whenever the existence of the relationship of principal and agent is in issue, the party relying thereon to establish his claim has the burden of proving its existence by proof, as any other fact would have to be proved. It is also incumbent upon the party relying thereon to establish the authority of the agent to bind the principal. The fundamental rules of the law of agency, on the issue of union responsibility is fully discussed in *Perry Norvell Company*, 80 NLRB in the *International Longshoremen's and Warehousemen's Union* case, 79 NLRB 207; and *Sunset Line and Twine Company*, 79 NLRB 1487 cases. In the latter case, the Board in describing the issue of union responsibility said:

> "1. The burden of proof is on the party asserting an agency relationship, both as to the existence of the relationship and as to the nature and extent of the agent's authority. In this case, for example, it was incumbent upon the General Counsel to prove, not only that the acts of restraint and coercion alleged in the complaint were committed, but also that those acts were committed by agents of the Respondent Unions, acting in their representative capacity. The Respondents' failure to introduce evidence negating the imputations in the complaint did not relieve the General Counsel of that burden."

The Intermediate report tried to shift this burden (B.A. 38), and inferred agency from presence. It has been estab-

lished that the mere fact that a union representative was present near the scene does not make the union responsible (R.A. 43, 44); nor the mere fact that the act may have been committeed by a rank and file member of a union is not enough to establish agency. *Irwin-Lyons Lumber Co.*, 87 NLRB No. 9, p. 54. Here for the most part the members identified were simply members or Mine Committeemen, but it is hereinafter shown that they have no authority to bind the Local.

The Trial Examiner in his findings attached the responsibility of the Local Unions because of the fact that some of its Mine Committeemen and some of its members were seen at the Cleghorn premises (B.A. 38). Among whom were Meline Serdich, Mine Committeeman, for Local Union No. 4047 (B.A. 38, 78), referred to in the Board's Brief as President of Local 4047 (B.B. page 7).[11] Lee Allawat, Mine Committeeman for Local Union No. 1379 (B.A. 121).

There are no other allegations concerning the agency of the foregoing men. It is the contention of the Petitioners that the presence of Mine Committeemen on the picket line at the Cleghorn premises does not attach responsibility to the Local Unions. The limited agency of a Mine Committeeman is set forth on Page 55 of the General Counsel's Exhibit No. 3 introduced by Government's witness L. F. Wilson (B.A. 126), and that part of General Counsel's Exhibit No. 3 has been made a part of the Petitioners' (Respondents') Appendix (R.A. 12-13) and the following quotation is pertinent to show the limited agency of a Mine Committeeman:

"MINE COMMITTEE

"A Committee of three (3) Mine Workers, who shall be able to speak and understand the English language, shall be elected to each mine by the Mine Workers em-

[11] Board's Brief.

ployed at such mine. Each member of the Mine Committee shall be an employee of the mine at which he is a committee member, and shall be eligible to serve as a committee member only so long as he continues to be an employee of said mine. The duties of the Mine Committee shall be confined to the adjustment of disputes arising out of this agreement that the Mine Management and the Mine Worker, or Mine Workers, have failed to adjust. The Mine Committee shall have no other authority or exercise any other control, nor in any way interfere with the operation of the mine; for violation of this clause any or all members of the Committee may be removed from the Committee * * *".

Applying these fundamental principles of the law of agency to the fact situation in this case, shows the complete failure of the Government in sustaining its burden of proof as to agency.

The record is entirely void of any evidence that Stalnaker was an agent of the District for any purpose except contract negotiations. Certainly implied agency cannot be stretched to make District 31 responsible at the time when none of its alleged agents are shown to be present at the alleged happenings. Stalnaker was only alleged to be present on two occasions (B.B. 5).

The General Counsel attempted to attach responsibility to the Petitioner Unions by showing that some of its individual members were present. The General Counsel presented the evidence of the superintendents and former supervisory employees of different coal companies to the effect that certain persons were employees of their companies. No agency of these employees for and on behalf of their unions was proven by any affirmative evidence. The Trial Examiner and the Board put a few of these employees of the different companies at the scene of the happenings, or showed that their automobiles were near the scene or on

the public road near the scene, and infer from that evidence that they were members of the Local assigned to those particular mines, and that they were at the scene of the happenings and were charged with the authority from their particular Local Union to act for and on behalf of the Local Union, and that the acts charged to them were committed as said Locals authorized agents and with their approval (B. A. 38).

It should be noted that most of these Local Unions had hundreds of members (R. A. 28), (R. A. 33), and that for the most part not more than a small group were shown to be present at any one place or at any one time. Hence to assume that any or a small part of the members could carry the agency or implied authority of the entire Local membership without an affirmative showing that the Local approved what was done, is to assume an agency which was not proved in evidence and without ratification to support it.

(d) *Automobile License Numbers Constitute No Factual Evidence*

Although the Trial Examiner in his Intermediate Report (B. A. 37) affirmed by the Board's order, ruled that the automobile license numbers were not admissible evidence to prove the presence of their owners at or near the Cleghorn tipple, counsel for the Board persist in using these exhibits (General Counsel Exhibit Numbers 17-A and 17-B) (B. A. 599 and 601) to substantiate some of the statements made in the Board's brief (R. A. 72, 73), before the Circuit Court of Appeals.

The Intermediate Report of the Trial Examiner (B. A. 37) stated:

> "The fact that the individual automobile may have been at the scene does not establish that the owner was

present, nor can it logically be contended that the presence of the owner may be inferred therefrom. Such evidence standing alone must be rejected as establishing that the owner was present."

We agree with the Trial Examiner that such weak proof cannot form a legal basis for a finding against the named Locals. It is apparent that the fact that an individual's car was present 2000 feet from the happening, or on a public road near the happening, does not establish that any individual was present at the Cleghorn tipple, nor can it logically be contended that their presence may be inferred therefrom. The contrary possibility is too well known to permit such inference. *Bitner Fuel Company*, 92 NLRB 146; 28 LRRM 2291.

(e) *The Swaney Case*

The facts in the *Swaney* case are so entirely different from the facts in the *Cleghorn* case that the two cases should never have been consolidated. This was recognized by the Trial Examiner in his Intermediate Report. (B. A. 19). where?

The Board by consolidating the cases and having only one hearing, expanded and enlarged the case, thereby placing it beyond its proper perspective.

The background evidence in the *Swaney* case is that B. H. Swaney, Inc., and B. H. Swaney & Sons, Inc., and the Swaney Trucking Company are shown by the evidence to be owned and operated by practically the same persons (R. A. 31, 35, 62). The different companies were used by the owners to fit their particular jobs as the occasions arose (R. A. 30, 60, 61). B. H. Swaney, Inc. and B. H. Swaney & Sons, Inc., signed their last union contracts on July 6, 1948 (R. A. 29, 30, 61), and the same were continued in force until January, 1950 (R. A. 28, 29, 61). In December, 1949,

the owners of the Swaney Companies organized the Swaney Trucking Company for reasons best known to themselves (R. A. 60). But the fact remains that the most aggressive union sympathizers were its truck drivers, and the owners of these Companies saw to it that on January 1, 1950, all of their truck drivers were transferred to the Swaney Trucking Company, a partnership, which was not under union contract, or the continuation of any union contract (B. A. 376, 377 and 378).

This Trucking Company was disbanded according to Mr. Swaney in July or August, 1950 (R. A. 31). It only existed for approximately six (6) months. It was not in existence at the time of the hearing (R. A. 31). It is clear from the evidence that the Swaney interests organized this Trucking Company for the sole purpose of getting rid of its union employees and for the purpose of breaking up this Local Union (B. A. 497-498) (B. A. 376, 377, 378). That it accomplished its purpose is certainly shown by the record. At about the same time Swaney supervisory employees proceeded to organize a company dominated union known as the "Bushy Fork Strip Miners Union". Walter Lawson, a witness for the Government, testified (R. A. 68, 69) that he was asked to join this union by Scott Tanner, a foreman for Swaney at the Oral Lake Tipple (Robert Walker's testimony confirms the foregoing). (R. A. 69, 70).

It is quite evident from the evidence of P. S. Hill, B. H. Swaney, Robert T. Huchinson and Walter Lawson, that the Swaney management took advantage of the fact the defunct Local 8327 was no longer in existence, and the evidence is clear that the "Bushy Fork Strip Miners Union" was a prima facie company dominated organization for the purpose of preventing the reactivation of Local 8327 at the Oral Lake Tipple. Objections to going into this phase of the case was sustained by the Trial Examiner (B. A. 382).

Here was evidence of a violation of Sec. 8(a)(2) of the Act by the Swaney Companies. Instead of Petitioners being charged in this proceeding by the Board, it is submitted that the Swaney Companies should have been proceeded against by the General Counsel and the Board. The Court should not allow the Swaney management to seek the aid of this Court and at the same time to hide behind its corporations and partnerships (R. A. 31). The General Counsel never mentioned the fact that the B. H. Swaney, Inc., was also under union contract dated July 6, 1948 (R. A. 30, 59) and (R. A. 62).

Hence, it is clear from the record that the pickets in the *Swaney* case were former employees of one of the Swaney Companies and were picketing for recognition and the reactivation of ther defunct Local and for the signing of a union Contract (R. A. 67, 68). This they had a right to do under the Act (Sec. 13-Act). The situation which was created was precipitated in part by the action of the owners of the Swaney Companies who could not agree among themselves (R. A. 64) (R. A. 68).

The inference of the Trial Examiner and the Board, that the employees of Swaney did not have the right to set up a picket line at the entrance to the Oral Lake Tipple for the purpose of inducing or encouraging other truck drivers to strike or refuse to perform any part of their work is certainly wrong, for the right to picket is guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. *Thornhill* v. *Alabama*, 310 U. S. 88. *Thomas* v. *Collins*, 323 U. S. 516. *Blossom Dairy Co.* v. *Teamsters*, 125 W. Va. 165; 23 S. E. (2) 645. As well as by the Act itself. (Secs. 7 and 13 Act.)

The record therefore contains no substantial evidence which would show that District 31, and said Local Unions as entities, committed, authorized, instigated, acquiesced in,

or ratified the alleged acts set forth in the Complaint. The findings of the Trial Examiner and the Board should not be sustained when based on such weak proof. *Universal Camera Corp.*, 340 U. S. 474; 71 Supreme Court Reporter 456.

III

The Order of the Board Is Too Broad, Is Unjust and Improper and Is Beyond the Board's Power and Jurisdiction and Should Not Be Enforced.

The questions presented herein are (1) Whether the acts shown provide a proper basis for a broad cease and desist order against the Petitioners, as to all employees of the coal mining industry within the geographical limits of District 31, United Mine Workers of America, and (2) Whether Sections 1(a) and (b) and 2(a), (b) and (c) of the Board's Order are appropriate, just, proper and valid.

The Order of the Board, in parts 1(a) and (b) thereof (B. A. 7-8) not only ordered District 31 and Local Unions 4050, 4346, 1379, 2338, 4047 and 8327 to cease and desist from certain unfair labor practices as to the employees of Cleghorn and Swaney, but extended this cease and desist order to all employees engaged in the mining industry within the geographical limits of District 31, not just "coal mining", and in addition thereto under the affirmative action part of the Board's Order 2 (a) (b) (c) (B. A. 8-9), it not only orders the posting of Appendix "A" of the order at the business offices of District 31 and the six (6) named Locals, but it also orders that District 31 forward to each and every Local of the 175 Locals of District 31, United Mine Workers of America, a copy of said Appendix "A" to be posted at each Local of District 31 for a period of 60 days, and that said notice shall be communicated to the membership of each Local in the District. This, of course, includes Locals 6593, 4060 and 4740 which were heretofore

dismissed from the proceedings and would affect approximately 23,000 men.

It is contended that the Order of the Board is therefore too broad, is inappropriate, unjust, improper and invalid, and is not warranted by the Complaint and the evidence in this case, and is outside the scope of the consolidated proceedings, and is not supported by the reasonable evidence in the record.

It should be pointed out, that even if the events occurring in Upshur County are admissible in this proceedings, that the events alleged herein occurred in only two of the twelve counties in Northern West Virginia, covered by District 31, and affected only two employers and six Local Unions out of hundreds of employers and 175 Local Unions in that area. To extend the effect of this proceedings to hundred of employers and Local Unions, and thousands of employees in that area engaged in all kinds of mining, is expanding and enlarging the case beyond its proper perspective, and beyond the reasonable evidence in the file to support it.

Because the two consolidated cases herein arose from such different basis of fact, and arose at different times, September 19, 1949, to February 1st, 1950, in the *Cleghorn* case, and April 7, 1950, to May 26, 1950 in the *Swaney* case, and because the *Cleghorn* case arose from a non-union situation, and the *Swaney* case from a union situation, and there is no affirmative showing that any members of the Groups which visited the Cleghorn Tipple ever visited the Swaney tipple, nor that the Swaney employees ever visited the Cleghorn tipple, the record herein does not indicate a planned program as was found by the Board as a basis for the broad cease and desist order granted in *N. L. R. B.* v. *U. M. W. A. District 23., et al.*, 92 NLRB 128, 30 LRRM 2022 (C. A. 6) (No. 11406).

Two more different and isolated fact situations cannot be imagined. The two cases concern different named Locals in each instance. The Trial Examiner recognized this (B. A. 19). The alleged occurrences were several months apart. The *Swaney* case arose out of a union dispute between the employer and the remnants of a defunct Local Union at a former mining operations which had been under Union contract for approximately five years (R. A. 14). The *Swaney* case occurred after the great majority of mines were back in operation after the signing of the March 5, 1950 National Bituminous Wage Agreement.

An alleged remark made by an alleged District 31 representative in the *Cleghorn* case in October of 1949 should not be sufficient when consolidated with the *Swaney* case happenings of April, 1950, to bring these two isolated cases within the Rule of the *West Kentucky* case, *supra,* even though the same were consolidated for the purpose of hearing by the Regional Director.

The fact that a *prima facie* Company dominated Local Union was organized at the Swaney Oral Lake Tipple simultaneously with the transfer of the employees of the Swaney Trucking Company and the dissolution of the Trucking Company, should cause the Court to scrutinize the evidence of this particular case very carefully. No stretch of the imagination can blend these two cases together to create a fact situation for the application of the broad cease and desist order granted and enforced. The record here does not clearly indicate that from these two isolated and different fact situations, that all the Petitioners were engaged in a planned program to apply the same technique to all the different mining operations within its jurisdiction. Members of different Locals are alleged to be involved, and the time element is different. The happenings were at least two months apart. Only two counties in West Virginia are men-

tioned (B. A. 389). The mere fact of consolidation of these two separate, distinct and unrelated cases, for the purpose of trial cannot supply the necessary basis for such an order. *Cookeville Shirt Co.*, 79 NLRB 667; *Express Pub. Co.*, 312 U. S. 426; *Ford Motor Co.*, 119 Fed. (2d) 326 (CA-5); *Universal Camera Corp.*, 340 U. S. 474, 71 Supreme Court Reporter 456.

Petitioners submit that for the reasons hereinbefore discussed, the Order of the Board as ordered to be enforced by the Circuit Court of Appeals in this regard is too broad, is inappropriate and unwarranted, and is without competent, admissible and substantial evidence to support it, is contrary to the preponderance of the evidence contained in the record of this case, and is contrary to law.

Petitioners further submit that even though the Court concludes that Petitioners may have committed unfair labor practices as charged in the Complaint as to Cleghorn individually or both Cleghorn and Swaney, that the recommended board cease and desist order of the Board and its affirmative act provisions cannot be upheld and adopted because it exceeds the Board's power and jurisdiction under the Act, and particularly Section 10 thereof, and it exceeds also the limitations which the federal judiciary has imposed upon the Board's power and jurisdiction to issue cease and desist orders.

The Court of Appeals for the Fourth Circuit, in enforcing that portion of the Board's order which related to the Board's finding that petitioners had violated Section 8(b)(1)(A) of the Act and which requires petitioners to cease and desist from "Restraining and coercing the employees, or any of them, of L. E. Cleghorn and S. H. Swaney, Inc. or any other employees engaged in mining operations within the geographical limits of the jurisdiction of District 31, United Mine Workers of America in the exercise of rights guaranteed to them under Section 7 of the Act" imposes

upon labor unions and their agents (petitioners herein) an injunction broadly to obey the statute (Section 8(b)(1)(A), a requirement condemned by, and in conflict with, this Court's pronouncements in *National Labor Relations Board* v. *Express Publishing Company*, 312 U. S. 426; *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376; and *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217; and which other federal Courts of Appeals have likewise rejected, in cases involving the issue of enforcing blanket cease and desist Board orders against employers found guilty of violating the rights of employees guaranteed under Section 7. See:

NLRB v. *Reliable Newspaper Delivery, Inc.*, 3 Cir., 187 F. 2d 547, 550; *NLRB* v. *Newark Morning Ledger Co.*, 3 Cir., 120 F. 2d 262, 269; *NLRB* v. *Cleveland-Cliff Iron Co.*, 6 Cir., 133 F. 2d 295, 302; *NLRB* v. *Armour & Co.*, 10 Cir., 154 F. 2d 570, 577-578; *Joy Silk Mills* v. *NLRB*, D. C. Cir., 185 F. 2d 732, 745; *NLRB* v. *Servel, Inc.*, 7 Cir., 149 F. 2d 542, 544; *NLRB* v. *Gluek Brewing Co.*, 8 Cir., 144 F. 2d 847, 857; *NLRB* v. *Walt Disney Productions*, 9 Cir., 146 F. 2d 44, 50; *NLRB* v. *National Biscuit Co.*, 3 Cir., 185 F. 2d 123, 124; *NLRB* v. *Ford Motor Co.*, 5 Cir., 119 F. 2d 326; *NLRB* v. *Consolidated Machine Tool Corp.*, 2 Cir., 163 F. 2d 376, 379; and *NLRB* v. *Reliance Mfg. Co.*, 7 Cir., 125 F. 2d 311. Teller, *Labor Disputes and Collective Bargaining* (April, 1947, Cumulation Supp.).

The blanket cease and desist order in the instant case and its posting provisions are clearly at variance with and contrary to the foregoing cases. Here the order of the Board is broader than the Complaint, and as the Court stated in *N.L.R.B.* v. *Ford Motor Company, Supra*, the Board acquires only jurisdiction as to the subject matter of the Complaint. Clearly this holding of the Board in the instant case

and as ordered by be enforced by the Fourth Circuit Court of Appeals, is unwarranted under the Complaint, pleadings, evidence and findings of fact and conclusions of law, if we are to apply the same law to unions as this Court has heretofore applied to employers under the Act.

Heretofore in proceedings to enforce Board orders against an employer found guilty of unfair labor practices under the 8(a) Sections of the Act, this Court has rejected broad cease and desist orders and has declared that a "decree of enforcement should not extend further than necessary to prevent the taking of the prohibited action by the employer." *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217, 226. Likewise, this Court, in *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 433, made it clear that the Board is without authority under Section 10(c) of the Act "to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct." In that case there appears the juridical declaration that "Congress did not contemplate that the courts should, by contempt proceedings, try alleged violations of the National Labor Relations Act not in controversy and not found by the Board and which are not similar or fairly related to the unfair labor practice which the Board has found" (312 U. S. 435). *May Dept. Stores Co.* v. *National Labor Relations Board*, 326 U. S. 378, provided a judicial yardstick for determining the proper scope of a Board Order. Therein this Court declared (at page 390):

> "The test of a proper scope of a cease and desist order is whether the Board might have reasonably concluded from the evidence that such an order was necessary to prevent the employer before it from engaging in any unfair labor practices affecting commerce."

In like manner Circuit Courts of Appeals in proceedings against employers under the 8(a) Sections of the Act have refused to enforce Board Orders beyond the complaint upon which the Board based its findings. In a case where the Board found that an employer had been guilty of a single isolated act against a single employee, the Third Circuit held that "the entry of a blanket order to cease and desist from all violations of the Act is not justified". *National Labor Relations Board* v. *Newark Morning Ledger Co.*, 3 Cir., 120 F. 2d 262, 269. The Sixth Circuit, striking from a Board order the words "in any other way", declared that it is "undoubtedly the better view that the order should not go beyond the evidence supporting unfair labor practices alleged." *National Labor Relations Board* v. *Cleveland-Cliff Iron Co.*, 6 Cir., 133 F. 2d 295, 302. The Tenth Circuit, likewise rejecting a Board Order the effect of which was to enjoin an employer from in any manner interfering with, restraining or coercing its employees in the various rights guaranteed under Section 7 of the Act, modified the Board order to the one activity which constituted the unfair labor practice. *National Labor Relations Board* v. *Armour & Co.*, 10 Cir., 154 F. 2d 570, 577-578.

Similar omnibus portions of the Board's orders have been deleted by the Court of Appeals for the District of Columbia in *Joy Silk Mills, Inc.* v. *National Labor Relations Board*, D. C., Cir., 185 F. 2d 732, 745; by the Fifth Circuit in *National Labor Relations Board* v. *Ford Motor Co., Supra*, at p. 330-331 and subparagraph (f) on p. 327; by the Seventh Circuit in *National Labor Relations Board* v. *Servel, Inc.*, 7 Cir., 149 F. 2d 542, 544; by the Eighth Circuit in *National Labor Relations Board* v. *Gluek Brewing Co.*, 144 F. 2d 847, 857; and by the Ninth Circuit in *National Labor Relations Board* v. *Walt Disney Productions*, 146 F. 2d 44, 50. In *National Labor Relations Board* v. *National*

Biscuit Co., 3 Cir., 185 F. 2d 123, 124, the Court limited its decree "to specific practices complained against".

In the case of *Reliance Mfg. Co.* v. *National Labor Relations Board*, 7 Cir., 125 F. 2d 311, 321, 322, the Board insisted on the enforcement of a broad cease and desist order very similar to the order in the instant case. The Court denied the enforcement of the order as written and stated:

> "Petitioner makes what we think is a valid criticism of 2(1). This paragraph has to do with the posting of notices informing employees that it will not engage in the unfair labor practices from which it is ordered to cease and desist. It is required that these notices be posted 'in each and every one of the plants which petitioner now operates.' As stated heretofore, the complaint originally involved charges of unfair labor practices at ten of petitioner's thirteen plants. The charges were dismissed by the Board for want of proof as to one (Loogootee, Indiana) and severed as to one (Washington, Indiana), leaving eight involved in the instant proceeding. Notwithstanding that there was no charge of unfair labor practices as to three of the plants, and that the charge was dismissed as to one, this order requires that notices be posted in all of them. In support of this provision, the Board argues that the unfair labor practices were system-wide, centrally directed and coordinated and, therefore, the order should apply to all plants. It cites in support of its position *N. L. R. B.* v. *Express Publishing Co.*, 312 U. S. 426, 61 S. Ct. 693, 85 L. Ed. 930. In our judgment there is nothing in this case which supports the Board's position. On the other hand, in *N. L. R. B.* v. *Ford Motor Co.*, 5 Cir., 119 F. 2d 326, the court expressly held against the Board's contention in a similar situation. The court found the Board was without jurisdiction to make an order broader than the subject matter of the complaint. We agree with this conclusion. Furthermore, we think that petitioner, if it, at some future time, should be charged with an unfair labor practice at a plant or plants not included in the instant proceed-

ing, *would be entitled to a hearing before the Board rather than this Court in a contempt proceeding.* This paragraph should be modified accordingly. (Emphasis supplied.)

The affirmative action ordered in the instant case is very similar to the foregoing *Reliance Mfg. Company* case. Except that in the instant case labor unions are involved and in the *Reliance* case the plants of an employer were involved. In the *Reliance* case the charges were dismissed by the Board as to one of the employer's plants and severed as to another, leaving 8 out of an original 10 plants charged with unfair labor practices. Notwithstanding this fact, the Board Order in the *Reliance* case had required *that notice be posted as to all plants,* including the plants which were dismissed for lack of evidence. The Court disagreed with the Board in this regard and denied that part of the Order.

In the instant case the original consolidated complaint involved charges against District 31, United Mine Workers of America and nine (9) Locals Nos. 4050, 4060, 4346, 1379, 6593, 2338, 4047, 4740 and 8327. The Trial Examiner and the Board dismissed the charges of unfair labor practices for want of proof as to three (3) Locals Nos. 6593, 4060 and 4740, and dismissed charges of unfair labor practices for want of proof as to all Locals as to Swaney Trucking Company, Howard T. Mitchell and Paul Crites, the other employers named in the Complaint.

Notwithstanding that there was no charge of unfair labor practices as to the balance of approximately 165 Locals in District 31, and charges were dismissed as to three (3) Locals, this order requires that notices be posted at *all local unions* of District 31, and that the order should apply to all employees in Northern West Virginia engaged in mining even though the charging parties were only two employers engaged in *Coal mining* in one County of North-

ern West Virginia, and the evidence presented affected only the employees of these two employers.

In the instant case, the Circuit Court of Appeals for the Fourth Circuit, contrary to and in conflict with said decisions entered against employers has applied to a Board order against labor unions and their agents a rule contrary to the rule established by this Court for enforcing Board orders against an employer found guilty of the commission of unfair labor practices. If such cases are not applicable because labor unions and their agents, and not an employer, are involved, then there is thus presented a federal question of general and grave importance, particularly to every labor union, their agents and their members, and this Court should settle the question whether Section 10(c) of the Act empowers the Board to enter an order against labor unions and their agents broader than the subject matter of the complaint, and whether a Court of Appeals is authorized under Section 10(e) of the Act to enforce such Board Order.

F

A Question of First Impression

We believe that this Court has never before passed on this precise question under the 8(b)(1)(A) Sections of the Act, so that the question in the instant case is whether this Court should not limit such broad cease and desist orders under the 8(b) Sections of the Act, as it has heretofore limited the application of the same under the 8(a) Sections of the Act.

G

Reasons Relied on for Allowance of the Writ

1. Petitioners respectfully submit that Section 10(b) of the Act does not leave it entirely to the "discretion" of the Trial Examiner and the Board, as to when "The Federal

Rules of Civil Procedure" should be followed in Labor Board Hearings (B. A. 5).

2. Petitioners respectfully submit that the Board's findings herein against District 31, United Mine Workers of America, and Locals Nos. 4050, 4346, 1379, 2338, 4047 and 8327 are not supported by substantial evidence on the record considered as a whole.

3. Petitioners contend that the Board's order as issued, is too broad, is inappropriate, unjust, improper and invalid.

4. Petitioners respectfully submit that even if this Court finds substantial evidence on the record considered as a whole to support the finding of the Board and the Circuit Court of Appeals, that the Petitioners violated Section 8(b)(1)(A) of the Act, yet this Court should modify the order of the Board as ordered to be enforced by the Circuit Court of Appeals, by limiting its application to the employees of the original charging Companies, and to the specific acts found by the Board to be violations under the complaint, and further that the Board's order for affirmative action and the posting requirements of said order, should be modified to comply with such modification (B. A. 7-9).

Conclusion

For the reasons hereinbefore set forth, it is submitted that the Petition for Writ of Certiorari as prayed for should be granted.

Respectfully submitted,

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APPENDIX "A"

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. IV, 151 et seq.) are as follows:

"DEFINITIONS

"SEC. 2. When used in this Act—

"(5) The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

"(13) In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequent ratified shall not be controlling."

"RIGHTS OF EMPLOYEES

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

"UNFAIR LABOR PRACTICES

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) * * *

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *;

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: * * *;

"PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10(b). . . . "PROVIDED, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, . . . Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, Secs. 723-B, 723-C."

* * * * * * *

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *"

* * * * * * *

"(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of

such order and for appropriate temporary relief or restraining order and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *"

"LIMITATIONS

"SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

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STATUTE:

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*):
Section 7 23
Section 8 (b) (1) (A) 2, 23
Section 10 (a) 24
Section 10 (b) 14, 24
Section 10 (c) 25
Section 10 (e) 25
Section 10 (f) 26
National Labor Relations Board Rules and Regulations, Series 5 (12 Fed. Reg. 5656):
Section 203.33 (b) 3, 28
Federal Rules of Civil Procedure:
Rule 43 (c) 16

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 364

UNITED MINE WORKERS OF AMERICA, DISTRICT 31, AND LOCALS NOS. 4050, 4346, 1379, 2338, 4047 AND 8327, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. A. 83-84) is reported at 198 F. 2d 389. The findings of fact, conclusions of law, and order of the National Labor Relations Board (B. A. 2-46) are reported at 95 NLRB 546.[1]

[1] Record references are made to the appendix to the Board's brief in the court below, referred to as "B. A.", and to the appendix to the brief of the respondent in the court below, "R. A."

JURISDICTION

The judgment of the court below was entered on July 18, 1952 (R. A. 85-86). The petition for a writ of certiorari was filed on September 29, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether the trial examiner complied with the requirement of the Act that "so far as practicable" the proceedings be conducted in accordance with the rules of evidence of the Federal Rules of Civil Procedure

2. Whether substantial evidence in the record considered as a whole supports the Board's findings, sustained by the court below, that petitioners, in violation of Section 8 (b) (1) (A) of the Act, restrained and coerced the employees of Cleghorn and Swaney by engaging in threats, mass picketing, and violent conduct.

3. Whether, on the basis of the Board's findings, the Board properly ordered petitioner's to cease and desist from restraining and coercing, in any manner, the employees of Cleghorn and Swaney, and any other employees engaged in mining operations within the geographical limits of the jurisdiction of District 31, and further ordered petitioners to transmit copies of the notice, for posting, to each local of District 31.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151 *et seq.*), are set forth in the Appendix, *infra*, pp. 23-27.

STATEMENT

Upon the filing of charges by L. E. Cleghorn, and B. H. Swaney, Inc., hereinafter referred to as Cleghorn and Swaney, respectively, pursuant to Section 203.33(b) of the Board's Rules and Regulations, Series 5 (12 Fed. Reg. 5656), set forth in the Appendix, *infra*, p. 28, the cases were consolidated for purposes of hearing, and a consolidated complaint was issued (B.A. 551-569). Thereafter petitioners filed a motion to dismiss the complaint, an answer to the complaint, and a motion for severance and for a bill of particulars (B.A. 574-578, 585-595, R.A. 1-5). The motions to dismiss and for severance were denied, but the bill of particulars was granted in part (B.A. 66, 582-583). Following the consolidated hearing, at which petitioners introduced no evidence and their officers failed to appear or to bring certain documents with them in compliance with subpoenas duly served upon them, the trial examiner issued a single intermediate report (B.A. 12-46) and the Board a single decision and order (B.A. 2-11). The pertinent facts, as found

by the Board, with which the court below agreed, may be summarized as follows:

A. The Facts as Found by the Board

1. The Mass Picketing, Threats, and Violence Against Cleghorn's Employees By District 31 and Locals 1379, 4050, 4348, 4047 and 2338 Were Undertaken to Prevent the Employees From Working

On September 19, 1949, the United Mine Workers of America began a strike affecting all the coal mines east of the Mississippi River (B.A. 19; 158, 159).[2] Commencing on this date and through February 10, 1950, on at least seven different occasions, groups of pickets, up to as many as 200, sought to close Cleghorn's Lost Creek, West Virginia, tipple operations (B.A. 19, 23-30; 153, 159, 164, 168, 177, 181, 192, 219, 223, 234, 237, 241, 243, 295, 300, 302, 314, 342, 347). Although Cleghorn's 14 employees were not union members, these pickets demanded that the employees join with the pickets in "fighting for a full day week," "shut down until this strike is over," and "quit and be with us and * * * get this thing settled" (B.A. 19, 23, 27; 156-158, 160, 166, 178-179, 193, 198, 206, 209, 212, 229, 270, 280, 289). Claiming to be United Mine Worker members, and usually in groups of one hundred or more (B.A. 23-25, 26-29; 160, 163, 171, 178, 192, 200, 209, 212, 229, 231-234, 237, 247, 252, 255-257, 275, 279-284, 311-314), the

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[2] In this statement, the page numbers preceding the semicolon in record references refer to the Board's findings; page numbers following the semicolon refer to supporting evidence.

pickets: blocked the entrances to the tipple property with their cars, and prevented hauling coal to the tipple (B.A. 23-25; 154-160, 165, 167, 169, 170, 186, 189, 200-205, 211-212, 229-230, 234, 236, 238, 247-249, 266-268, 275, 281, 296-297, 304, 311, 315, 319, 327); dumped coal from Cleghorn's trucks, on the highway in the vicinity of the tipple, or on the tipple premises, blocking access to and egress from the coal scales (B.A. 23, 24, 28; 154-166, 170, 177, 181, 185-186, 195, 205, 210, 229-237, 252-253, 261-263, 268, 287, 290-292, 295-296, 304, 312, 322-323); in the presence of Cleghorn's employees, threw rocks at the trucks hauling coal (B.A. 26; 177, 201, 216-218, 242-243, 250-251, 277, 330-331, 337-338, 340); cursed, and threatened to "get pretty rough" with, "get", "kill," and "knock some teeth out," and otherwise physically to assault the employees who continued working (B.A. 23-25, 27-30; 162, 167, 171, 182, 195, 205-206, 210-211, 220-225, 228-229, 234-235, 252-253, 268, 278-279, 290, 292-294, 297-298, 305-306, 312-316); and threw rocks at and assaulted the employees, driving them from the tipple (B.A. 25-26; 170-176, 197-199, 237-240, 251, 257-260, 264-265, 269, 272-275, 286, 294, 307-310, 315-318).

Operations at the tipple were suspended for the day every time the picketing occurred because access to the tipple or its properties was blocked, because of the violence, or because the 14 employees at the tipple were afraid to work and fled

upon the arrival of the large groups of hostile pickets (B.A. 23, 25, 26, 27; 156-158, 163-165, 168-169, 176, 182-183, 187, 193-200, 223-225, 233, 237-241, 246, 251, 254, 259-260, 266, 310, 311).

Among the pickets were many identified as officers and members of Locals 1379, 4050, 4346, 4047, and 2338[8] including Kenneth Stalnaker, organizer for District 31 (B.A. 5-6, 23-30, 38; 78-86, 87-99, 117-124, 164-166, 172, 183-185, 189-191,

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[8] Although not every local participated on all seven occasions, all participated on at least one occasion and all but two participated in three or more incidents. Thus, officers of Local 1379 participated in the unfair labor practices on five different occasions, and one or more members was present on four of those ocasions, including the incident of February 8, when its treasurer and 25 of its members were arrested (B.A. 6-7, 23, 25, 27, 29, 38; 117-124, 207, 212-213, 227, 289, 293, 295-300, 320-325, 347-354, 590, 591, 592-593, 599-601, GCX 14-16). Meline Serdich, president and mine committeeman of Local 4047, led the pickets on three occasions, and 47 members were positively identified on one (B.A. 627-30, 38; 79-82, 183-185, 198-199, 221-222. 279-281, 283-284, 292-303, 320-325, 328-354, 600, GCX 14-16). Members of Local 4050 participated on at least five different occasions, including one when its recording secretary and two of its elected mine committeemen, together with 25 members were present (B.A. 5-6, 23, 25, 27, 29-30, 38; 91-97, 178-179, 206-209, 271, 289-290, 295-300, 302-303, 320-325, 326, 354, 589, 599-600, GCX 13-16). Ralph Migialolo (also referred to as Frank Mike in the transcript) president of Local 4346, and chairman of that Local's mine committee, participated in the violence and mass picketing on October 22 (B.A. 5-6, 25, 38; 88-90, 213-214, 225, 289-290), while the financial secretary of Local 2338, together with 7 members, participated in the violence and were among those arrested for acts of violence on February 8 (B.A. 5-6, 29, 38; 84-86, 295-300, 320-325, 337-354, 590, 593-594, 601, GCX 14-16).

197-200, 206-209, 212-215, 221-228, 246-249, 270-271, 275-284, 288-290, 292-293, 295-303, 320-333, 343-354, 590-594, 599-601, Tr. 1518, GCX 13-16). Their activities were carefully and avowedly synchronized with the strike policies of the United Mine Workers of America. Thus, the initial occasion of mass picketing, threats, and violence occurred on September 19, 1949, the very day the United Mine Workers abandoned the three-day work week, and instituted a total strike, which lasted until about November 9 (B.A. 19; 158, 159). During this period the pickets, demanding that Cleghorn's employees join in "fighting for a full day week," "shut down until the strike is over," and "quit and be with us and * * * get this thing settled," invaded the tipple premises, cursed and threatened Cleghorn's employees, dumped coal from the trucks, and blocked the ramp to the coal scales, and access to the property (B.A. 19, 23; 159-164, 202-216, 223-226, 228-236, 245, 252-255, 261-263, 266-271, 285-290, 304-307, 311-314, 318-319). Stalnaker, one of the leaders of the pickets during this period, announced to Cleghorn that "There is a strike on;" demanded that Cleghorn "shut down until this strike is over"; and warned that "eventually [they] would get around to all of them [non-union mines]" and "before the thing was over everyone would be shut down" (B.A. 19, 24, 25; 165-168, 189, 192-195, 227-228, 248, 270, 283, 289, 313).

No picketing activities occurred during the United Mine Workers' abandonment of all strike activities. However, on December 1, about the time of the reinstitution of the three-day work week the pickets, again led by Stalnaker, invaded the tipple premises, assaulted Cleghorn and a supervisor in the presence of the employees, assaulted the employees, and drove the remainder from the tipple (B.A. 19, 25-26; 158-159, 168-176, 189, 236-241, 246-249, 251, 255-259, 264-265, 271-275, 282, 307-310, 314-318). And after the United Mine Workers resumed the total strike, the pickets again engaged in violence and threats, until, on February 1, Cleghorn was compelled to accede to the pickets' demands, voiced by their leader, Meline Serdich, president and mine committeeman of Local 4047, that he suspend operations at the Lost-Creek tipple indefinitely (B.A. 19, 26-27; 158-159, 177-186, 198-199, 216-218, 241-244, 249-250, 259-260, 276-281, 283-284, 290-294, 326-341) On this occasion, Serdich declared, "We are fighting for a full-day week. They [are] tired of working three days a week and couldn't make a living out of it. If you go along with us, and shut down, the thing will be over that much quicker and we will get a full week" (B.A. 27; 179, 183-184, 198, 222, 244, 293-294). When Cleghorn thereafter tried to operate a neighboring mine, under protection of a state injunction, the pickets threatened Cleghorn's truck drivers and forced them to dump

their truckloads of coal, until the West Virginia State police arrived to arrest the pickets for breach of the peace and violating the state injunction (B.A. 27-30; 186-189, 218-222, 294-303, 320-325, 342-354, 599-601, GCX 15, 17).

2. District 31 and Local 8327 Engaged in Threats, Violence and Picketing To Compel Swaney To Sign a Collective Bargaining Agreement.

Following the signing of the Bituminous Coal Agreement in March 1950, District 31 and Local 8327 engaged in similar conduct at Swaney's Oral Lake Tipple (also referred to as Erie No. 2 or the Rainbow Tipple), located in Harrison County, West Virginia (B.A. 6, 19, 20, 30-31, 39; 101, 103, 380-382, 401, 419-420, 424, 426, 463). The picketing activities at the Oral Lake Tipple were preceded by letters from District 31 demanding that Swaney sign an agreement covering the employees of his companies (B.A. 20-21; 103-111. 359-362, 365-366, 383-384, 398-399, 406-407, 596-598, GCX 20); by warnings from Kenneth Stalnaker, and Harry Bennett, organizer and secretary-treasurer of District 31, respectively, that unless Swaney met these demands, he would run the risk of a strike or violence (B.A. 21; 98-99, 107-110, 360-363, 365-366, 393, 398-399, 401); and by demands on the part of Local 8327 that Swaney recognize it as the bargaining representative of his truck drivers (B.A. 7, 20, 22; 110-111, 363-365, 384-387, 395-397, 399, 443-445, 497-498, 504-505). When Swaney or his representative required proof that a majority

of the employees were members of the organizations seeking to represent them, Bennett, on April 6, again threatened Swaney with a strike of his employees the following day unless Swaney signed (B.A. 21; 109, 362, 366-367, 401-402).

On the following day, those truck drivers who were members of Local 8327 refused to work unless Swaney immediately signed a contract with the United Mine Workers (B.A. 7, 22; 397, 402, 406, 408, 410, 472, 478, 493-494). When Swaney's representative requested that they continue working while negotiating their differences, the recording secretary of Local 8327 phoned District 31 headquarters at Fairmont, West Virginia for permission to defer the strike (B.A. 7, 39; 227, 408, 472, 475-476, 482, 495, 505). Upon District 31's refusal to grant the requested permission, the Union truck drivers left the tipple premises threatening, "there will be no coal hauled here today. We will see to that," and established a picket line near a bridge leading to the tipple and in plain view of the approximately 30 employees who continued working at the tipple (B.A. 7, 22, 31; 115-116, 402, 406-407, 410, 413-417, 421-422, 445, 447-448, 454-455, 463, 475-478, 495-497, 517-521, 524).

At the bridge, on that day and thereafter, the strikers were joined on several occasions by Stalnaker and Bennett, and by other pickets (B.A. 31-35; 111, 413, 420-422, 425, 431, 436-438, 442, 448-

449, 454-459, 463-464, 473-474, 478-481, 498-500); stopped employees at the bridge and demanded that they join the United Mine Workers (B.A. 31-32; 83, 99, 110-112, 114, 393, 394, 427, 436-437, 455, 463-466, 473, 477, 479-483, 529-535, 538, 547-549); blocked the road leading to the tipple from the bridge with their cars and by placing a log across the highway (B.A. 31-33; 111-114, 414-416, 419-426, 432, 437-438, 479, 496-497, 523-524, 528, 539, 542, 547); forced some of Swaney's trucks hauling coal to the tipple to dump the coal near the highway (B.A. 32, 33; 426-427, 435, 440, 539-540, 547-548); ran several of the trucks into the ditch along the highway (B.A. 33; 441-443, 548); assaulted one driver in plain view of the employees at the tipple (B.A. 34; 430-431); and forced four trucks, one of which was driven by a Swaney employee, to pass by the blockade at the bridge in single file, and threw rocks at the trucks as they ran the blockade, breaking the windshields of two of the trucks, within the view and earshot of the tipple employees (B.A. 33; 114, 116, 127-129, 424, 425, 432-434, 448-452, 455-457, 511-513, 523-524, 541-543, GCX 21). On one occasion, April 11, the strikers together with about 75 or 100 pickets who had joined them, patrolled the highway betwen Swaney's mine and the tipple; stopped the trucks hauling coal; ran some of the trucks into the ditch along the highway; blocked the entrance to the mine; threw rocks at one em-

ployee who passed the pickets; dumped the coal from two loaded trucks; and ran a third fully loaded truck, driven by a Swaney employee, down a grade and over an embankment, materially damaging the truck (B.A. 33-34; 425-431, 439-444, 452-453, 458-462).

Finally, on May 26, cursing the employees, shouting "we told you fellows to shut this place down," and throwing rocks, slate and coal at the employees, the pickets overran the tipple grounds (B.A. 34-35; 466-468, 483-486, 488-490, 499-501, 507-508, 513-515, 525-526, 536). They dragged one crippled employee from his chair, threw him to the ground, jumped on his crippled leg, and severely beat him; kicked and beat another employee who had fallen down while attempting to flee from the pickets; drove the other employees from the grounds; and damaged property on the premises, pulling the telephone from the wall and tearing the door of the storage house from its hinges (B.A. 34-35; 467-469, 475, 484-487, 490-492, 508-510, 515, 525-527, 536-537).

Only after C. J. Urbaniak, president of District 31, promised Swaney that there would be no further picketing at Oral Lake if Swaney signed a contract with District 31 covering the employees at another operation leased by Swaney, and Swaney signed the agreement, did the picketing and violence at the Oral Lake Tipple cease (B.A. 35; 83, 100, 379-380, 392, 403-406, 445-446, 474, 589, 591).

B. The Board's Conclusions and Order

The Board concluded that District 31, and Locals 4050, 4346, 1379, 2338, and 4047 restrained and coerced the employees of Cleghorn (B.A. 3, 5-6, 35-36, 38, 39), and that District 31 and Local 8327 restrained and coerced the employees of Swaney (B.A. 3, 6-7, 35-36, 39), in the exercise of their right, guaranteed by Section 7 of the Act, to refrain from engaging in the concerted activities of petitioners, and that petitioners had thereby violated Section 8 (b) (1) (A) of the Act. The Board further concluded that petitioners' conduct was "but a part of a planned program to apply the same techniques to all the non-union mines within the organizing jurisdiction of District 31" (B.A. 5-6, 40-41).

Accordingly, the Board ordered petitioners to cease and desist from, in any manner, restraining and coercing the employees of Cleghorn and Swaney, or any other employees engaged in mining operations within the geographical limits of the jurisidiction of District 31, in the exercise of their right to refrain from concerted activities guaranteed them by Section 7 of the Act (B.A. 7-8). Affirmatively, the Board ordered (B.A. 8-11) petitioners to post the usual notices at their business offices, and to direct the proper officers of each of District 31's locals to post notices or communicate the contents of the order to its local's membership.

C. The Decision of the Court Below

In a *per curiam* decision enforcing the Board's order in full, the court below first rejected petitioners' "chief grounds of attack", those relating to the consolidation of the proceedings and the sufficiency of the evidence. It held that the consolidation rested within the "sound discretion" of the Board, and that petitioners had suffered no prejudice thereby (R.A. 84). Secondly, the court below concluded that, as "fully and correctly set forth" by the Board and the trial examiner, "it is abundantly shown that representatives of [petitioners] engaged in threats and violent conduct in attempts to coerce the employees of Cleghorn and Swaney in the exercise of rights guaranteed them by the act" (*ibid.*). Finally, the court below held that the other objections to the order of the Board, including the scope of the order, were "entirely lacking in merit" (*ibid.*).

ARGUMENT

1. In the petitioners' statement of the questions presented (Pet. 19), and specifications of errors (Pet. 24), it is suggested that the Board erred in construing the Act to give it discretion to apply or not to apply the rules of evidence provided in the Federal Rules of Civil Procedure.

The language of the Act is clear. Section 10(b) (Appendix, *infra*, pp. 24-25) provides that "any such proceeding shall, so far as practicable, be

conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States * * *". There can be no question that this provision does vest a measure of discretion in the Board and its trial examiners to determine when it is impracticable to apply the rules. The real question in this case is whether the Board misapplied this discretion.

The basis of petitioners' complaint is not entirely clear. At page 25 of their brief, petitioners complain concerning the limitations placed by the trial examiner on their cross-examination of government witnesses and of the protection given to government witnesses. Petitioners seek to support their complaint by listing 22 items in footnote 8 on page 25, some of which have no reference to the matters complained of. The petitioners in no way connect the great majority of these items with any particular provisions in the Rules of Civil Procedure. In any event, no one of the items individually, nor all combined, appear to have been erroneous or to have deprived petitioners of a fair hearing.[4]

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[4] Many of the statements or rulings of which petitions complain, e.g., (1) through (5), (8) and (9), were for the purpose of developing a clear and concise record. Other rulings, e.g., (10) through (13), show on their face that the questions propounded by petitioners were immaterial to the issue of whether petitioners had violated Section 8

Items 18 and 20 do refer to the action of the Board, which is also specifically mentioned on page 26 of the brief, upholding the rulings of the trial examiner limiting cross-examination and refusing to permit petitioners to make a record of evidence excluded by him so that the exclusion could later be passed upon by the Board. The petitioners do not now press their assertion that the evidence was improperly excluded. Therefore, whether or not it was error to refuse permission to make a record of the evidence,[5] no prejudice to petitioners is shown, or even claimed. At most there seems to have been a failure to record proffered evidence which apparently was properly excluded. If there was error, no harm has come from it.

Actually, petitioners seem to be complaining more with respect to the language used in the

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(b) (1) (A) of the Act. The other examples cited involved statements of legal conclusions of the examiner or rulings on the admissibility of evidence, none of which, we submit, constituted error. But even if some of the rulings were erroneous, they did not constitute that kind of substantial error which "fatally infect[s] the trial" and warrants a new hearing. *Lisenba* v. *California*, 314 U.S. 219, 236. At most, it can only be said of this case, "While there might not have been a perfect trial, yet when the record is viewed as a whole, we think it shows that [petitioners were] accorded a fair hearing." *National Labor Relations Board* v. *Bryan Mfg. Co.*, 196 F. 2d 477, 478 (C.A. 7).

[5] Rule 43(c) of the Rules of Civil Procedure contains an exception from the requirement that the evidence be taken in situations where "it clearly appears that the * * * evidence is not admissible on any ground."

Board's opinion than they do about the actual rulings of the Board or the trial examiner. It is submitted that this presents no issue appropriate for review in this Court.

2. Petitioners' challenge to the substantiality of the undisputed evidence summarized in the Statement, *supra*, pp. 4-12, was met by the finding of the court below (R. A. 84), that "it is abundantly shown that representatives of [petitioners] engaged in threats and violent conduct in attempts to coerce the employees of Cleghorn and Swaney in the exercise of rights guaranteed them by the act." We submit, therefore, that there is no occasion for a further consideration of the sufficiency of the evidence by this Court, for that is "a question which Congress has placed in the keeping of the Courts of Appeals." *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, 491; *National Labor Relations Board* v. *American National Insurance Co.*, 343 U. S. 395.

3. Petitioners' objections to the scope of the Board's cease and desist order and to the notice posting provisions of the order on the ground that they are improper and that they embody legal principles and tests different from those applied to employers (Pet. 39-48) were properly rejected by the court below (R. A. 84). The Board's order required petitioners, District 31 and its five locals which were found to have participated with Dis-

trict 31 in the restraint and coercion of employees of Cleghorn and Swaney, to cease and desist from "in any manner" restraining and coercing the employees of the named companies and of other companies within the territorial jurisdiction of District 31 in the exercise of their rights guaranteed under Section 7 of the Act. As this Court recognized in *National Labor Relations Board* v. *Express Publishing Company*, 312 U. S. 426, 438, a broad order is justified where, as here, "the record disclosed persistent attempts by varying methods to interfere with the right of self-organization in circumstances from which the Board or the court found or could have found the threat of continuing and varying efforts to attain the same end in the future". The court below accordingly agreed with the Board and the trial examiner, from whose intermediate report it quoted (R. A. 84), that:

> In the present case, * * * the record discloses a repetition in the Cleghorn case of the conduct in the Bitner case [*National Labor Relations Board* v. *United Mine Workers of America, District 31* (*Bitner*), 190 F. 2d 251 (C.A. 4)] immediately following the occurrences in latter case and continuing over a period of about 6 months, and a continuation in the *Swaney* case of the violent character of such conduct immediately following the Cleghorn matter. In addition, the record dis-

closes the threat made by Stalnaker that "eventually they would get around to all of them (non-union mines)," and "that before the thing was over everyone would be shut down." That this threat was not idle is evidenced by the conduct of District 31 in the *Swaney* case, and convinces me that all of this is but a part of a planned program to apply the same techniques to all the non-union mines within the organizing jurisdiction of District 31. To limit the order to the employees of the two charging parties in this case would be to disregard not only the danger of future commissions of unlawful acts to be anticipated from the course of conduct in the past, but the openly expressed threat of the extension of those violations to other employees.

For these reasons the requirement that petitioners cease and desist from restraining and coercing, in any manner, any employees engaged in mining operations within the jurisdiction of District 31 was "necessary to prevent the taking of the prohibited action by the [petitioners]." *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217, 226. Obviously, "* * * it is not necessary that all of the untraveled roads * * * be left open and * * * only the worn one be closed." *International Salt Co.* v. *United States*, 332 U.S. 392, 400, quoted with approval in

International Brotherhood of Electrical Workers v. *National Labor Relations Board*, 341 U.S. 694 at 706.

Equally without merit is petitioners' attack upon the notice posting requirements of the order. Initially, it should be noted that petitioners at no time specifically objected before the Board to this requirement, which was first recommended by the trial examiner (B.A. 43), and adopted in *haec verba* by the Board (B.A. 9). Petitioners only excepted to the order on the ground that the order was "unconstitutional" and "otherwise contrary to law (B.A. 56). "Such a general objection did not apprise the Board that petitioner[s] intended to press the question now presented" (*Marshall Field and Company* v. *National Labor Relations Board*, 318 U.S. 253, 255), so that petitioners are precluded from raising the question.[6]

In any event, the posting requirement is merely a means of effectuating the order against District 31, by requiring it to notify the members and officers of its constituent locals that it and the other petitioners herein will not restrain or coerce employees, and that their picketing and other legitimate organizing activities must be carried out in a lawful manner. The situation here is thus

[6] For this same reason, petitioners are now precluded from attacking the Board's order because it is not limited to "coal mining" (Pet. 39, 47), a question petitioners have raised for the first time in the instant petition.

similar to a requirement that an employer, found guilty of unfair labor practices, notify its supervisory personnel and agents of the contents of the Board's order. See, *e.g., National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U.S. 272, enforcing 2 NLRB 431, 459 (notify "every one of its officers and agents"); *Montgomery Ward & Co.* v. *National Labor Relations Board*, 115 F. 2d 700, 701, 704 (C. A. 8) (notify "all its present and any future undercover operatives"); *National Labor Relations Board* v. *Holtville Ice & Cold Storage Co.*, 148 F. 2d 168, 169 (C.A. 9), enforcing 51 NLRB 596, 599 (notify "all members and contributors" of respondent Association). Since the Board's order here does not, as in the *Reliance* and other cases cited by petitioners (Pet. 43-48), go beyond the scope of the complaint, the posting requirement is not in conflict with other decisions, and petitioners' challenge raises no issue of substance.

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any substantial question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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NOVEMBER, 1952.

APPENDIX

1. The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

* * *

[8] (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7:

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: * * * Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. * * * Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for

the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *.

* * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for

the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review

of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * *

2. Section 203.33 of the Board's "Rules and Regulations—Series 5 (12 Fed. Reg. 5656) in pertinent part:

> SEC. 203.33 *Transfer of charge and proceeding from region to region; consolidation of proceedings in same region; severance.*—Whenever the general counsel deems it necessary in order to effectuate the purposes of the act or to avoid unnecessary costs or delay, he may permit a charge to be filed with him in Washington, D. C., or may, at any time after a charge has been filed with a Regional Director pursuant to section 203.10, order that such charge and any proceeding which may have been initiated with respect thereto:
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> * * *
>
> (b) Be consolidated with any other proceeding which may have been instituted in the same region; * * *
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